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COVERT LEGISLATION AND THE CONSTITUTION

THIS anniversary LAW REVIEW should perhaps be commemorative and marked rather by reminiscence than forecast. Yet even here the minor prophets have a place, and the following pages are an attempt to picture, rather than survey, a field of constitutional contest by no means unknown, but certain to produce in the future a crop of acrimonious litigation larger than it has yielded hitherto. Lawyers will increasingly deal with statutes whose constitutional support bears no sincere relation to the legislative and popular purposes sought to be attained. This is covert legislation.

Obviously the legislative will is more likely to be thus covertly embodied by Congress than by state legislatures, because in national law-making a definite constitutional peg must be found whereon to hang the statutes; states have the harder task of evading definite prohibition.

Appetite for broad general legislation grows, and the discovery of enough powers enumerated or implied to justify national and nation-wide regulation of industrial and social conditions becomes increasingly difficult. Why partisans of every shade vie in urging Congress "to do through the agency of the national government the things which the separate state governments formerly did adequately"¹ is interesting but immaterial; the fact remains and produces an indirection in statute-making sure to affect the constitutional theories of lawyers, because such indirection seems necessary to accomplish results apparently demanded by majorities of laymen. Further, the popular desire for *national* legislation minutely affecting interpersonal relations is fostered and supplemented by the urge of local leaders to get "from Washington" as much pecuniary support as possible.

It is common knowledge that we have a federal Constitution historically representing painful compromise with a popular wish to keep *all* power at home, *i. e.*, in the states; that home feeling,

¹ ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP, 367. That the states ever performed "adequately" sounds like a polite but hollow compliment; nor does the context show that Mr. Root intended more.

the provincial instinct, is decaying fast; and even where it is yet strongest (as in the South) insistence on local help through national legislation is stronger, and all men ultimately think most and best of the good provider. Today a majority of all citizens turn to the nation as the provider.

Our professional preparation for criticism of the legislation, which is the certain corollary of the foregoing axioms, is worth consideration, as is also some view of the existing legislative situation. Experience we have had, but past instances of congressional indirection have not often been of the sort to attract acute public discussion; they have not come very near daily life, or have been popularly viewed and excused as "war" measures.

Upon the postal monopoly has been hung one of the most curious and least noticed minor increments of national power. What is now quite well known as the "scheme to defraud" statute had its origin in the Act of June 8, 1872,² passed into Revised Statutes, Section 5480, and after sundry enlarging changes is now Section 215 of the Penal Code. It was primarily designed to punish "green goods men" for swindling their equally dishonest victims, by tricks always embracing a bringing of dupes from a distance and to a crowded city, there to be cheated. Such criminals always depended (for distribution of bait) directly on postal facilities as distinct from personal contact. Accordingly the first statute ran: "If any person having devised . . . any scheme to defraud . . . to be effected by . . . *opening correspondence*" with others, and used the mail for that purpose, he was guilty. Now, and for years back, the law is that "whoever having devised . . . any scheme . . . to defraud, *shall for the purpose of executing such scheme,*" use the mail is guilty of offending against the United States.

The judicial treatment of this growth is a not uninteresting study in minute legal history,³ but the congressional advance is important. The nation has passed from trying to suppress a nuisance that depended on the mail for profitable existence, to punishing any and every procurement of money under false pretenses (and many other less definable frauds), if even inadvertently a postal card is mailed in the execution thereof. Those who have assisted in enforcing criminal law in centers of population, know well that the

² 17 STAT. AT L. 323.

³ It may be traced in GOULD & TUCKER, NOTES ON THE REVISED STATUTES, § 5480.

use of the mail is but a peg whereon to hang prosecution; the real reason of the law is the wish to use a subpoena running over the whole country, and to overcome local parsimony which declines the expense of punishing the more elaborate methods of relieving glibble speculators of their property. One who cheats only those residing outside his own state is fairly safe from serious prosecution in that state; most citizens think the nation should pay the cost of such prosecutions. Congress has accepted the burden, hung it on the postal monopoly, and years of acquiescence have probably formed a national habit.⁴

Indeed the habit of construing most benevolently the grant of power to establish post roads is well established. When the charter of a continental railroad is supportable thereunder, its application in physical extent can go no further, and acceptance in this sense has a real influence over the minds of men — including lawyers. When the power of legislative exclusion from postal privileges extends not only to matters commonly thought *mala in se* but to *mala prohibita* by Congress,⁵ what limit can be put to congressional prohibition?

Legislative (reflecting popular) feeling on the subject is well exemplified by the history of the first Cotton Futures Act.⁶ The plain object of that legislation was to prevent the sale of cotton for future delivery under any form of contract other than the one in effect prescribed by Congress; and to accomplish such result, the original bill denounced as “prohibita” and denied transmission by post to all written evidences of, or correspondence relating to, “futures” when the government form was not used.

This did not become statutory. Congress finally chose the taxing power, rather than the postal monopoly, as the constitutional support for the regulation of a business almost invariably intra-

⁴ In actual operation any fraud outside the common run of statutory larcenies, etc., may find its way into the federal courts, largely because the rules of trial for obtaining money under false pretenses do not apply. *Emanuel v. United States*, 196 Fed. 317, 322 (1912). *E. g.*, I have known two men who under pretense of finding capitalists who would finance inventions, took money from inventors, performed none of their promises, and never intended to. When looking for dupes in different towns in the same state, one of them forgot their mutual agreement to communicate only by telegraph, and wrote the other a letter which was duly received. This was enough to warrant a federal indictment, at the request of the county authorities.

⁵ *In re Rapiere*, 143 U. S. 110 (1891); *Rosen v. United States*, 161 U. S. 29 (1895).

⁶ 38 STAT. AT L. 693.

state and not yet regarded as affected by a public use; but the suggestion then made, of regulation (as distinct from suppression) by exclusion from a beneficial governmental monopoly, is worthy of more thought ⁷ than has yet been given it.

The whole history of lotteries, and legislation concerning them, is instructive. As soon as a working majority of the people thought them wrong, the writings, without which they could not live, became *mala prohibita* and as such excluded from the mails for the same legal reason as obscene literature.⁸ As soon as a like working majority comes to a similar conclusion as to tobacco, liquor,⁹ patent medicines, corsets, or any other advertised article, no reason is seen why restriction by postal exclusion cannot claim the conclusive support of the lottery cases; but assuredly that result will not be reached without new and intensive litigation.

Since the circulation of the notes of state banks was suppressed by prohibitive taxation,¹⁰ with the soothing judicial comment that the tax was not upon the obligation but on a particular use thereof (*i. e.*, the only profitable one), the covert capabilities of the taxing power have been sufficiently apparent. The only reason for not hanging more statutes on that constitutional peg has been absence of popular demand.

One of the smallest and most instructive of past congressional efforts in this direction is the Smoking Opium Act.¹¹ By this statute an enormous tax (\$10 per pound) was laid upon opium prepared for the pipe, while for the ostensible purpose of facilitating collection of undesired income, the manufacture of the product was surrounded with most of the incidents of license, bond, inspection and return, long used in respect of alcoholic spirits. No such license was ever taken out; no such tax was ever collected

⁷ The most accessible presentation of the case against the use of the postal monopoly as a weapon is Mr. James Coolidge Carter's argument in *Rapier's case* (143 U. S. 113). It is a pity that Bradley, J., did not live to answer it (p. 132). Mr. Carter's doctrine was utterly rejected; whether such rejection has left any logical limit to regulation by exclusion from the mails I venture to doubt.

⁸ See *Horne v. United States*, 147 U. S. 449, for history of lottery legislation.

⁹ Legislation of this sort against liquor advertising has often been proposed in Congress and is now there pending (and has become statutory since the text was written).

¹⁰ *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533 (1869). This act, like the charters of transcontinental railways, was contemporaneously regarded by laymen as produced by the necessities of war.

¹¹ 26 STAT. AT L. 620, §§ 36-40.

nor wanted. The purpose was prevention, and under the penal sections of the law many Chinamen were convicted for preparing their own poison. Quite naturally the courts nibbled at the statute (after citizens had been convicted) by insisting on regarding it as a revenue act,¹² an almost jocular finding, which has not prevented fairly successful enforcement of its actual purpose.

The latest cognate statute, having for its real object suppression of habit-forming drug sales (the Harrison Act),¹³ proceeds along newer and more delicate lines. The tax is nominal (\$1 for registration), but the penalties for selling without registration are severe, and one who registers and sells without a physician's prescription is guilty of crime against the United States, while such criminal will (in many of the states) also run counter to local laws of great stringency, with the national agents furnishing the evidence and the United States paying their salaries and expenses.¹⁴ This last is a very modern development.

Oleomargarine in its earlier days encountered national treatment differing in degree only from that accorded smoking opium. *McCray v. United States*¹⁵ was the result — a decision wherein the court used language inconsistent with any subsequent effort to go behind the declared purpose of any act when that avowed or ostensible purpose is constitutional taxation. Taxation in some form can nearly always be justified; rarely is a purpose to transfer money's worth from one person to another apparent on the face of the bill; then of course "it is none the less a robbery because it is done under the forms of law and is called taxation."¹⁶

From prohibitive taxation of a new, obnoxious, or unpopular thing to classification as a basis for graduated or selective taxation is a step that opens great possibilities of legislation and litigation. This method of covert regulation of business finds a most interesting illustration in the present Cotton Futures Act.¹⁷

¹² *Shelley v. United States*, 198 Fed. 88 (1912); *Seidler v. United States*, 228 Fed. 336 (1915).

¹³ 38 STAT. AT L. 785.

¹⁴ This statute has been considered in *Wilson v. United States*, 229 Fed. 344 (1916), which decision (and others similar) are undoubtedly overruled by *U. S. v. Jin Fuey Moy*, 241 U. S. 394, a ruling suggestive of the attacks to come upon legislation of the sort under consideration.

¹⁵ 195 U. S. 27 (1903).

¹⁶ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 664 (1874).

¹⁷ 39 STAT. AT L. 476.

This statute in effect divides all dealings in the staple made on an Exchange and for future delivery into two classes: those in which the government form of contract (created by the act itself) is used, and those in which it is not. On the privilege of dealing under the approved contract, no tax is laid; on that of dealing in any other way, an excise of crushing weight is imposed.

Classification for benefits or burdens, and taxation by selection, are familiar enough in legislation and decisions; but it seems a novel use of the process for Congress to make out of the whole cloth a new method of transacting an old business and then put all the old methods out of existence by a tax.

Most businesses and all recognized professions could be regulated along analogous lines, and the field thus simply and ingeniously opened for national control will surely be explored by legislators and lawyers far more thoroughly than in the past. Indeed this particular plan of campaign is (in the language of patents) "thought to be broadly new."

The restraint with which the commerce clause has been expounded for over a century is perhaps the most remarkable example of a certain continuity of thought in the Supreme Court persisting through generations of men and politics. No one has finally indicated its limits, perhaps because all felt that vision was as through a glass darkly. But in the past the questions presented for solution have for the most part called for definitions of commerce, or delimitation of its often shadowy boundaries. Cautiously worded statements have resulted, almost always capable of expansion without contradiction, when circumstances altered cases.

The very near future will call upon the profession to deal with increasing regulation of output or production, sheltered behind the proposition, unanswerable in itself, that what is produced in one state cannot get into another for gainful purposes without forming part of the interstate commerce of the nation.

The Pure Food Law ¹⁸ is in practice an excellent sample of what may be called habit-forming statutes. It prohibits, under penalties rising in severity with repetition of offenses, the carriage in interstate commerce of many things—some dangerous, some disgusting, more unsanitary, a smaller proportion mere advertisers'

¹⁸ 34 STAT. AT L. 768.

catchpennies, but all calculated to annoy the judicious when their innate untruthfulness is exposed.

In the constitutionality of this statute there has been a general acquiescence; except in the "blended whisky" matter¹⁹ there has hardly been serious contest over its provisions. For most makers of food and drug products the effective implement of discipline has not been so much actual fine or imprisonment as the publication in journals or bulletins of wide circulation of the names and offenses of those successfully (and often unsuccessfully) proceeded against. This publicity lends quite a sharp edge to the statute by spoiling business. In practice this act regulates manufacture, for few producers are so local that an *agent provocateur* cannot get his order filled across the state line.²⁰

The recently passed Grain Standards Act²¹ seems to take another step forward. The main object of the Pure Food Law was to make men tell the truth about what they already had for sale, under penalty of forbidding interstate commerce in their falsehoods; but the Grain Act standardizes a method of telling the truth by creating a national inspection service, classifying and describing wheat, etc., and then forbidding the interstate transference of grain not so classified. And to this scheme for not only regulating commerce but regulating that which is to enter into commerce, is added the Warehouse Act,²² which is probably intended to make it easier to store and deal in governmentally classified grain than in other and similar products of the soil not seeking national classification. The Child Labor Bill,²³ proceeding along analogous lines, renders penal the interstate transportation of anything toward the production of which (under certain circumstances) minors under sixteen have contributed labor.

The one thing common to all this regulation of behavior, pro-

¹⁹ GWINN, FOOD AND DRUGS ACT (Government Printing Office, 1914), 818 *et seq.*

²⁰ Of the practical working of the statute, *Brina v. United States*, 179 Fed. 373 (1910), and *Von Bremen v. United States*, 192 Fed. 904 (1912), are fair illustrations, the first of ease in reaching a small local dealer who commonly sold, and in the poorer quarters of New York City only, cottonseed oil as "Salad Oil," by implication olive oil. The second case shows the difficulty of similarly proceeding against a dealer who had behind him the ably represented producers of cottonseed oil. Yet upon the whole the regulatory object of this act has largely succeeded, apparently to popular satisfaction.

²¹ 39 STAT. AT L. 482.

²² 39 STAT. AT L. 486.

²³ 39 STAT. AT L. 675.

duction and business, is that the Congress, not being able directly to prohibit men from doing what they have hitherto done, nor directly compel them to do what the majority desires, has created by statute a new standard of conduct or method of business procedure, put upon it the seal of congressional approval, and by taxation, or exclusion from the post or interstate commerce, made life miserable for those who refuse to square their lives in accordance with the legislative preference.

The preparation of the bar, as represented by judicial decisions or other published studies, for criticism of what is already a fair list of covert statutes, seems to indicate welcome rather than hostility.

A tax, however onerous or unjust, if laid *secundum artem* must be sustained, unless it is

“plain to the judicial mind that the (taxing) power has been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests”;

then it may be conceded

“that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred.”²⁴

Just when abuse of a conferred power becomes the exercise of unconferrred authority is indeed a puzzle, especially when the solution thereof seems to depend upon the discovery of some “principle of freedom and justice” itself protected by the Constitution and violated by the act, and when all courts must remember that annulment of statutes on “grounds merely of justice or reason or wisdom” constitutes the most far-reaching evil that could come to our system of government.²⁵

The postal monopoly is apparently subject to no limitations save such as are imposed by malicious exercise of official power based on statutory authority, or by a statute’s destructive or confiscatory effect on lawfully existing property rights.²⁶ But no instance can be cited of plain statutory exclusion in respect of writings or articles

²⁴ *Per* White, J., 195 U. S., at p. 64.

²⁵ *Atkin v. Kansas*, 191 U. S. 207, 223 (1903).

²⁶ *Public Clearing House v. Coyne*, 194 U. S. 497 (1903).

allied with an unpopular business being held unconstitutional; and the difference between unpopularity and *malum prohibitum* is very easy to extinguish.

So far as the commerce clause is concerned, it is now beyond peradventure that Congress may keep "the channels of interstate commerce free from immoral and injurious use" ²⁷ to the extent of severely penalizing an excursion from one state to another by a man and his mistress. The comparative demerits of *l'union libre* and impairing national stamina by child labor are not unlikely to be gravely discussed in our highest court; that we may discover whether the channels of freight are as well entitled to be freed from goods produced by youthful overexertion as is passenger traffic from human bodies immorally used.

While the postal monopoly, the taxing power, and the commerce clause by no means exhaust the list of constitutional supports for indirection and insincerity in law-making, they furnish enough food for thought.²⁸

To the exercise of most law-making powers, classification is necessary, and inequality has often enough been held to be an inherent attribute of classification; the process, when it is mere selection of victims (as it often is), has long furnished the most debatable ground of litigation. Standardizing morals, behavior, and business, and penalizing non-conforming persons and things, is in essence classification; and no more definite test of valid classification has ever been given than that it must be reasonable and based on matters "which in the nature of things furnish a reasonable basis for separate laws and regulations." ²⁹

To be sure, "the simple decision of the legislature" has been refused recognition as such reasonable ground;³⁰ but the historic truth is stated in *Atchison, etc. Co. v. Matthews*,³¹ by the admission that great diversity of opinion has existed on the subject, because

²⁷ *Caminetti v. United States* (U. S. S. C., Jan. 15, 1917).

²⁸ As a prop and cover for legislative activity the power of granting patents is worth some study, while tariffs could be adjusted with reference rather to manner of production than value of product. The Federal Farm Loan Act (39 STAT. AT L. 360) states that one of its presumably constitutional purposes is "to furnish a market for United States bonds." This is a thought capable of growth.

²⁹ *Gulf, etc. Co. v. Ellis*, 165 U. S. 150, 155 (1896).

³⁰ *Wisconsin, etc. R. Co. v. Jacobson*, 179 U. S. 287, 302 (1900).

³¹ 174 U. S. 96, 105 (1898).

"to some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis for classification."

It is not likely that the problems presented by actualities in legislation, not to dwell on possibilities, will be advanced for decision as questions of classification. Every effort will be made to avoid that quagmire. But the moment the word "arbitrary" is injected into controversy (and it cannot be avoided) an inquiry is started soluble only by struggle with the same inherent difficulties that have attended contests over regulation of working conditions by many states.³² The appeal to the courts against something complained of as arbitrary or unreasonable is usually based on the hope that some court will find it inexpedient — in the high sense of answering no necessity of the civilized requirements of the day.

As judicial comment now stands, if any step in the accomplishment of organized human design requires the employment of means *per se* subject to federal burdens or regulation, or constitutionally capable of federal encouragement or protection, the action of Congress in barring or aiding that step cannot be judicially set aside (no matter what ulterior purpose is plainly seen) without recourse to those rules of reason or expediency to which courts are more and more being driven. That method of decision makes every case one of fact, and yet under our system produces as precedents the opinions on those facts of a jury of judges, who in all good conscience are necessarily actuated or dominated by mental attitudes or predilections based on heredity, environment, and education, as all other juries are. This is truly a most unsatisfactory result from a juridical standpoint.

In practical operation these covert statutes are missionaries of centralization, and tend increasingly to destroy our inherited theories of local rule. A conscientious judge will of his own motion, and a careless one must on the defendant's motion, instruct juries that the federal crime of which they may find an accused guilty is not perpetrating a swindle, or selling decomposed matter for food, or poisoning the world with opium — but merely mailing or receiving a letter which of itself is harmless enough, or transporting

³² "Due Process of Law and the Eight-Hour Day," 21 HARV. L. REV. 495, is a careful study by Judge Learned Hand of some of these difficulties, which have certainly not grown smaller since that essay was written.

a can of lies across an artificial boundary line, or failing to pay a grotesque tax, as the case may be. Juries listen to the perfunctory charge on this head with open grins, but devote themselves conscientiously to considering exactly what Congress wanted them to decide, and rather enjoy the cleverness of the indirection.

This is a species of intellectual dishonesty anything but conducive to straight thinking and fair acting. How far the push for national management will take us along these tortuous paths is a serious question to which those lawyers who think of anything beyond their instant case would do well to give thought. Our present apparatus of statutes, decisions, and habits do not assist clear vision, nor make for a governmental system which legally and intellectually is straightforward and direct. If the result long ago sought by glorifying the "general welfare" preamble can be as nearly accomplished by indirection as now seems probable, and is certainly possible, it would be in the interest of common honesty that Congress at once receive full authority to reach the goal directly, and not as now by the back stairs.

Charles Merrill Hough.

UNITED STATES CIRCUIT COURT OF APPEALS,
NEW YORK.